No. 96-1278

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In The

Supreme Court of the United States

October Term, 1996

DOUGLAS A. CLARK AND CHERYL CLARK,

Petitioners,

v.

CITY OF HERMOSA BEACH, THE CITY COUNCIL OF THE CITY OF HERMOSA BEACH,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California Second Appellate District

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Do petitioners have a federally protected property interest in their desire to demolish the existing and economically viable duplex on their property and replace it with condominiums when they have no entitlement to do so under California law or the Hermosa Beach Municipal Code?

2. If petitioners have no federally protected property interest in their desire to replace their duplex with condominiums, does a denial of the fair hearing required by state law on their permit application constitute a violation of federal procedural due process?

3. Can petitioners state a federal procedural due process claim based on the denial of a fair hearing when California law provides an adequate remedy and the court below has already ordered the City to give petitioners a new hearing?

4. Was the denial of petitioners' application on grounds that their planned condominiums are not compatible with surrounding uses and exceed the permitted lot coverage, arbitrary, irrational and a violation of federal substantive due process when the City's zoning requires denial under those circumstances?

5. Did the actions of the City Council in permitting a councilmember later held to be biased, and in first considering a legal issue after the close of the public hearing, constitute arbitrary, irrational conduct and a violation of federal substantive due process when the City Council requested and acted upon the advice of counsel before taking those actions?

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 6

A. THERE IS NO FINAL JUDGMENT IN THIS CASE 6

B. THE PETITION SEEKS TO RAISE A CLAIM THAT WAS NOT RAISED BELOW 7

C. THE PETITION MISLEADS THIS COURT BY CLAIMING THAT THE COURT BELOW APPLIED A "SHOCKS THE CONSCIENCE" TEST TO REJECT PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM; IT REJECTED THAT CLAIM BECAUSE THE CITY DID *NOT* ACT IN AN ARBITRARY OR IRRATIONAL MANNER 9

D. THE PETITION MISLEADS THIS COURT BY CLAIMING THAT THERE IS A SPLIT OF AUTHORITY AMONG THE FEDERAL CIRCUITS CONCERNING THE DUE PROCESS ISSUES PRESENTED BY THIS CASE 12

E. THIS CASE DOES NOT RAISE ANY ISSUE CONCERNING THE RIGHT TO REASONABLE USE OF LAND OR ANY ISSUE WHICH REQUIRES THIS COURT TO CLARIFY THE RIGHTS OF LANDOWNERS IN THEIR PROPERTY 14

F. THE OPINION BELOW IS CLEARLY CORRECT 16

1. There Is No Basis For Finding A Violation Of Federal Procedural Due Process In This Case Because No Federally Protected Property Interest Is Involved 16

TABLE OF CONTENTS – Continued

Page

2. There Is No Basis For A Federal Procedural Due Process Claim In This Case Because State Law Provides An Adequate Remedy 18

3. There Was No Arbitrary Or Irrational Conduct In This Case Which Could Provide The Basis For A Substantive Due Process Claim 22

CONCLUSION 24

TABLE OF AUTHORITIES

Page

CASES

Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 100 L.Ed.2d 62, 108 S.Ct. 1645 (1988) 8, 9

Board of Regents v. Roth, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972) 16, 17, 18

Chesterfield Dev. v. City of Chesterfield, 963 F.2d 1102 (8th Cir. 1992) 12

Creative Environments, Inc. v. Easterbrook, 680 F.2d 822 (1st Cir. 1982) 12

DeBlasio v. Zoning Board of Adjustment, 53 F.3d 592 (3rd Cir. 1955) 13, 14, 18, 20

Desmond v. County of Contra Costa, 21 Cal.App.4th 330 (1993) 2

Dore v. County of Ventura, 23 Cal.App.4th 320 (1994) 2

Harris v. County of Costa Mesa, 21 Cal.App.4th 663 (1994) 2

Hudson v. Palmer, 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984) 21

Jacobs, Visconsi & Jacobs v. City of Lawrence, 927 F.2d 1111 (10th Cir. 1991) 12

Parratt v. Taylor, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) 21, 22

River Park, Inc. v. City of Highland Park, 23 F.3d 164 (7th Cir.1994) 12, 19, 20

Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 71 L.Ed. 303, 474 S.Ct. 114 (1926) 16

TABLE OF AUTHORITIES – Continued

Page

Yee v. City of Escondido, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992) 7

Zinermon v. Burch, 494 U.S. 113, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990) 21, 22

STATUTES

28 U.S.C. Section 1257 6

42 U.S.C. Section 1983 7

California Code of Civil Procedure Section 1094.5 20

California Code of Civil Procedure Section 1094.5(f) 4

California Code of Civil Procedure Section 1097 7

RESPONDENTS' BRIEF IN OPPOSITION

Respondents, the City of Hermosa Beach and the City Council of the City of Hermosa Beach (the "City"), respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion (App.A) of the California Court of Appeal, Second Appellate District, which is published at 48 Cal.App.4th 1152 (1996).

STATEMENT OF THE CASE

This case is a garden variety zoning dispute concerning how high petitioners may build and how much of their property can be covered with a structure. It does not, as petitioners would have the Court believe, involve deprivation of the right to reasonable use of land and does not present any important issue justifying review by this Court.

The property which petitioners Douglas and Cheryl Clark (the "Clarks") own in the City of Hermosa Beach (the "City"), California, is located close to the beach in a multiple residential zone (R-3) and was already improved with a duplex when petitioners purchased it. (JA I, tab 19:223)[1] Petitioners rent one unit of the duplex to a tenant and keep the other for themselves for use on weekends and during vacations when they can come to California from their home in Arizona. (JA I, tab 19:168, 252, 275)

[1] References to "JA" are to the Joint Appendix filed by the parties in the California Court of Appeal, which contains the Administrative Record of the City's proceedings on the Clarks' application and the record of the proceedings in the trial court.

Petitioners now wish to demolish the duplex and build larger condominiums in its place. It is undisputed that the City will allow them do so if they will comply with City's standards concerning neighborhood compatibility (height) and lot coverage. Thus, the opinion below explains:

> "The City did not bar the Clarks from building the condominium project altogether; it denied their application without prejudice to submitting a revised plan reflecting the Council's concerns about height, lot coverage and usable open space. Thus, the *interest at issue* is not that of a landowner to construct a roof over his head; rather, it *is the Clarks' interest in building a structure having the specific dimensions they find desirable.*" (App.A 36)

The City's Municipal Code requires both a conditional use permit (§§ 7.2.4 & 1404, R.App. 8 & 10) and a precise development plan permit (§§ 1430-1432, R.App. 11-12) before condominiums can be built. The purpose of these permits is to give the City the discretion to (1) impose conditions to assure compatibility with existing and potential uses within the general area in which a proposed use is to be located; (2) impose conditions mitigating any adverse environmental impacts; and (3) deny permits for incompatible projects. (§ 1404, R.App. 10; § 1432, R.App. 11-12; §§ 1430-1432) California law authorizes cities to require discretionary permits for these purposes. *Harris v. County of Costa Mesa*, 21 Cal.App.4th 663, 971-72 (1994); *Desmond v. County of Contra Costa*, 21 Cal.App.4th 330, 337 (1993); *Dore v. County of Ventura*, 23 Cal.App.4th 320, 329 (1994).

The City's Municipal Code also establishes certain minimum requirements applicable to the R-3 zone. In this case the most relevant minimum standards are the 35 foot maximum height limit (§ 601, R.App. 8) and the 65% maximum lot coverage limit (2.29-1 §§ 606 & 607, R.App. 6-9). As the opinion below explains, these minimum requirements do not create any entitlement to build a condominium that is 35 feet tall or which covers 65% of the lot. Rather, the conditional use process and precise plan process both give the City the right to impose stricter standards (*e.g.*, less lot coverage, more open space and a lower height) to ensure compatibility with the neighborhood. (App.A 37-38; see § 1432(A), R.App. 11-12)

In this case, the City Council denied the permits because the 35-foot height of the proposed condominiums was incompatible with the neighborhood and petitioners' proposed condominiums exceeded the maximum 65% permitted lot coverage. (JA II, tab 20:440-441) However, the denial was without prejudice. This meant that the Clarks could submit a revised application meeting the City's concerns about the height and lot coverage of the condominiums without paying a new fee and without starting the process all over again. (JA II, tab 19:303; tab 20:441)

The evidence before the City at the duly noticed, public hearing on the Clarks' application showed that their property is a corner lot and is adjacent to R-1 and R-2 uses with heights of 25 and 30 feet (JA I, tab 19:212-219); many of the adjacent uses in the R-3 zone are also 30 feet or less in height, the residence immediately to the east of their property is between 25 and 30 feet in height; and 75% of the buildings in the neighborhood are

30 feet or less in height. (JA I, tab 19:162-163; 220-222; 240; 281-283; 297-299) The evidence also showed that the proposed condominiums exceeded the maximum permitted lot coverage under Municipal Code § 229.1. (JA I, tab 19:288-291)

The opinion below explains that the City's concern with the height of the condominiums and lot coverage were legitimate and that the City's decision could not be considered arbitrary or irrational. (App.A 43-44) However, it held that the Clarks were denied the fair hearing required by California law because a councilmember who participated was biased and the Clarks were not given an adequate opportunity to respond to the City Council's interpretation of the lot coverage provision.[2] The remedy for that injury provided by California law (Cal.Code Civ.Pro. § 1094.5(f), R.App. 6), and ordered by the court below, is to remand the Clarks' application to the City for a new hearing without the participation of the councilmember found to be biased. (App.A 24-30 & 49-50)

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[2] While the City did not appeal the fair hearing ruling, the City strongly disputes the pejorative mischaracterizations of the "facts" alleged in the petition. Since the fair hearing issue has already been decided, the rather lengthy portion of the petition which accuses the City of denying the Clarks a fair hearing is irrelevant to the issues presented in the petition. Indeed, some of the so-called "facts" set forth in the petition involve events long before the subject permit application was filed in an attempt to create the erroneous impression that the City has long given the Clarks a bad time. In fact, the City granted the Clarks' two prior permit applications, but the Clarks allowed them to lapse without ever obtaining building permits. Those applications were not, as the petition implies, identical to the subject application.

The petition for certiorari seeks review of the portion of the opinion below which denies petitioners damages and attorneys' fees under § 1983. However, it does not challenge the portions of the opinion which hold that: (1) there is no entitlement to the permits under California law (App.A 35-38); (2) the California courts cannot compel the issuance of permits in the absence of such an entitlement (App.A 24-26); and (3) the remedy provided by California law is to order a new hearing in light of the court's opinion (App.A 24-25).

Further, the petition does not challenge the ruling of the court below (App.A 41 & 43-44) that the City did *not* act in an arbitrary or irrational manner in denying the permits. In fact, the petition ignores that holding entirely and claims, mistakenly, that the court below applied an improper "shocks the conscience" standard in evaluating their substantive due process claim. However, the opinion expressly holds that the Clarks do not have a substantive due process claim because they have no protected property interest and, alternatively, that if they have a protected property interest, there is no substantive due process violation because neither the City's decision nor its conduct was arbitrary and irrational. (App.A 41 & 44) That holding is clearly correct.

As the petition concedes, arbitrary and irrational conduct is required to establish a substantive due process violation. (Pet. at 22 and the cases cited there) Since the petition does not challenge the ruling below that there was no arbitrary and irrational conduct, there is no basis whatever for a substantive due process claim.

Thus, the only questions properly raised by the petition are (1) whether the denial of the fair hearing required by California law on the Clarks' application for permits to which they have no entitlement can be the basis for a federal procedural due process claim; and (2) whether the remedy for the denial of a fair hearing provided by California law precludes a federal procedural due process claim in this case. The court below correctly answered these questions based on well-settled law established by this Court and uniformly followed by the federal circuits. The Clarks have no federal procedural due process claim because they have no protected property interest in the discretionary permits they seek and California law has already provided an adequate remedy.

REASONS FOR DENYING THE PETITION

A. THERE IS NO FINAL JUDGMENT IN THIS CASE

Before the jurisdiction of this Court can be invoked by petition for certiorari review, the petition must show that the decision of the state court which it seeks to have reviewed is final. 28 U.S.C. § 1257.

The court below reversed the judgment of the trial court and remanded this case to the trial court with instructions for further proceedings. The trial court has already issued a new writ of mandate directing the City to hold a new hearing without the participation of the biased councilmember. (R.App. 1-2) Under California law the trial court retains jurisdiction after the issuance of a writ so that it can enforce the writ and determine whether the new hearing held by the City satisfies the mandate of

court of appeal and complies with all applicable law. (Cal.Code Civ.Pro. § 1097; R.App. 7) If the Clarks believe the City's decision at the new hearing is erroneous, they may challenge it in the trial court. However, all trial court proceedings and City administrative proceedings have been stayed pending the resolution of the petition in this Court (R.App. 5) and there is no final judgment in this case.

Although the Clarks have already been granted a new hearing, they claim federal due process violations so that they can also recover damages under 42 U.S.C. § 1983. Their claimed damages are based on alleged increases in the cost of constructing their proposed condominiums and loss of hoped-for profit from the sale of the condominiums. (App.C 17-18) These claims assume the permits needed to demolish their duplex and replace it with condominiums will be granted.

However, it is not known at this time whether or not the permits will be granted to the Clarks. If the permits are denied based on substantial evidence at a fair hearing, there would be no basis for awarding compensatory damages based on the increased costs of construction and lost profits. Thus, the claim for damages under 42 U.S.C. § 1983 which they seek to vindicate in this Court is premature.

B. THE PETITION SEEKS TO RAISE A CLAIM THAT WAS NOT RAISED BELOW

As *Yee v. City of Escondido*, 503 U.S. 519, 533, 118 L.Ed.2d 153, 169, 112 S.Ct. 1522 (1992), citing *Illinois v.*

Gates, 462 U.S. 123, 218-220, 76 L.Ed.2d 527, 536, 103 S.Ct. 2317 (1983), explains:

> "In reviewing the judgments of state courts under the jurisdictional grant of 28 U.S.C. § 1257, the Court has, with very rare exceptions, refused to consider petitioners' claims that were not raised or addressed below."

As *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 77-78, 100 L.Ed.2d 62, 72, 108 S.Ct. 1645 (1988), further explains:

> " '[a]t the minimum . . . there should be no doubt from the record that a claim under a federal statute or the Federal Constitution was presented in the state courts *and that those courts were apprised of the nature or substance of the federal claim*, at the time and in the manner required by the state law."

The petition claims that the court below erred in not recognizing that the Clarks' interest in their property gives them a federally protected property interest. (Pet. 15-19) However, that is not the claim they put before the trial court. It is not the claim they raised in their respondents' brief in the court below or in their petition for rehearing in that court. Nor did they raise this claim in their petition for review in the California Supreme Court.

Instead, the Clarks claimed in those courts that they had an entitlement to, and a federally protected property interest in, the permits needed to demolish their duplex and replace it with condominiums. They argued that this interest arose from the extensive procedural requirements

for granting and denying the permits established by California law and the City Municipal Code and claimed those requirements deprived the City of discretion.

The trial court erroneously accepted this claim. (App.A 39, fn. 32, App.C 9-10) However, the court below correctly rejected it, and reversed the trial court, because it is established California law that there is no entitlement to discretionary permits, such as the conditional use permit and precise plan permit at issue in this case. (App.A 38-40) However, the claim made by petitioners in this Court was never presented or addressed in the California courts.

The "consideration of comity to the States," which underlies the "not pressed or passed upon" rule, should, therefore, preclude certiorari review in this case. *Bankers Life & Casualty Co.*, 486 U.S. at 79, 100 L.Ed.2d at 73.

C. THE PETITION MISLEADS THIS COURT BY CLAIMING THAT THE COURT BELOW APPLIED A "SHOCKS THE CONSCIENCE" TEST TO REJECT PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM; IT REJECTED THAT CLAIM BECAUSE THE CITY DID *NOT* ACT IN AN ARBITRARY OR IRRATIONAL MANNER

The petition asserts that the opinion below erroneously applied a "shocks the conscience" standard in determining whether the conduct and decision of the City constituted a violation of substantive due process. That claim is contrary to the express holding of the court below that the substantive due process claim fails

because the City's conduct was neither arbitrary nor irrational. (App.A 41)

Thus, while the opinion below (App.A 40-41) notes that some courts have limited the application of substantive due process in land use cases, have limited its application to "liberties deeply rooted in this Nation's history and tradition" and have applied a "shocks the conscience" standard, the opinion holds that:

> "As indicated in our discussion of the Clarks' procedural due process claim, they have no protected property interest in the requested permits. (See pt.II.A, *ante*) Accordingly, the substantive due process claim fails for that reason alone. Alternatively, even if a constitutionally recognized property interest is involved, *we find that the City did not engage in arbitrary or irrational conduct.*" (App.A 41, emphasis added)

The opinion further explains that the City's conduct cannot be considered irrational because:

> "Although we have concluded that Councilmember Benz had a conflict of interest in voting on the project, the city attorney advised the Council at the public hearing that there was no conflict. That advice was incorrect, but it was not irrational. In light of the city attorneys' opinion the Council did not act irrationally by allowing Benz to participate in the proceedings.[3]

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[3] As noted in footnote 33 (App.A43), many of the factual claims advanced at the trial and relied on by the trial court and court below in finding Benz to be biased were never presented to the City Council or the city attorney during the hearing even though they were known to the Clarks at the time of the hearing.

> "Plainly, the Council erred in considering and deciding issues raised for the first time after the public hearing was over. Further, it *may have* misconstrued or misapplied the provisions of the zoning ordinance concerning lot coverage and usable open space. Nonetheless, the Council's ultimate decision to deny the permits did not lack a rational basis."[4] (App.A 43, emphasis in the original)

The opinion also explained that the City's concern about the 35-foot height of the Clarks' condominiums was rational in light of the "evidence that most of the homes in the area were 30 feet in height or lower" and the testimony of neighbors who considered the height of Clarks' project to be inconsistent with the neighborhood. (App.A 43-44)

Thus, contrary to the claims in the petition, the test applied by the court below was whether the City engaged in arbitrary and irrational conduct. That is the very test advocated by the Clarks and applied by the federal circuit court opinions on which they rely in the petition. (Pet. at 22)

Thus, there is no basis for the claim that the court below applied an improper "shocks the conscience" test to the Clarks' substantive due process claim.

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[4] Because of its ruling on the fair hearing issue, the court below did not decide whether the City's decision was supported by substantial evidence or determine the proper legal interpretation of the lot coverage provision.

D. THE PETITION MISLEADS THIS COURT BY CLAIMING THAT THERE IS A SPLIT OF AUTHORITY AMONG THE FEDERAL CIRCUITS CONCERNING THE DUE PROCESS ISSUES PRESENTED BY THIS CASE

The petition correctly acknowledges that, like the California Court of Appeal opinion below, the Second, Fourth, Sixth, Ninth and Eleventh Circuits require an entitlement to a permit before a federal procedural due process violation can arise from the denial of the permit. (Pet. at 13) The First, Eighth, and Tenth Circuits follow the same rule. *See Creative Environments, Inc. v. Easterbrook*, 680 F.2d 822, 831, 832-833 (1st Cir. 1982); *Chesterfield Dev. v. City of Chesterfield*, 963 F.2d 1102, 1104-1105 (8th Cir. 1992); *Jacobs, Visconsi & Jacobs v. City of Lawrence*, 927 F.2d 1111, 1116 (10th Cir. 1991).

In an attempt to manufacture grounds for certiorari review, the petition claims that the Seventh and Third Circuits have reached contrary results, and have found federal due process violations and liability under 42 U.S.C. § 1983 based on the denial of discretionary permits like those at issue in this case. That claim is erroneous.

While the Seventh Circuit opinion in *River Park, Inc. v. City of Highland Park*, 23 F.3d 164 (7th Cir.1994), does contain the language cited by the Clarks about the importance of rights in the ownership of land, it assumed that River Park had an entitlement to, and protected property interest in, the rezoning it sought. *Id.*, 23 F.3d at 165. Thus, it did not address discretionary permits such as those involved in this case.

Further, even though River Park had a protected property interest and the city in that case had improperly employed procedural maneuvers to keep River Park's application from being acted upon, the Seventh Circuit held that no federal due process claim had been stated because:

> "The Constitution does not require state and local governments to adhere to their procedural promises. (citations) Failure to implement state law violates that state law, not the Constitution, the remedy lies in state court." 23 F.3d at 166-167.

The Third Circuit decision cited in the petition also fails to support the claim that there is a conflict among the circuits. Thus, in *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 (3rd Cir. 1955), the plaintiff's property had been used as an auto body shop, which became a legal non-conforming use when the zoning was changed. The local zoning provided that the use could continue so long as it was not expanded or abandoned. *Id.*, at 594. The plaintiff therefore had an entitlement to continue the use. By contrast the Clarks have no entitlement to demolish their existing duplex and replace it with condominiums.

Further, the plaintiff in *DeBlasio* was appealing from a summary judgment rejecting all his claims. The Third Circuit affirmed the rejection of his procedural due process claim. It held that the procedural due process claim was barred by the adequate state court remedy available to DeBlasio. *Id.*, at 596-597. The Clarks' procedural due process claim in this case would fail for the same reason even *if* they had an entitlement similar to DeBlasio's.

The Third Circuit reversed the dismissal of DeBlasio's substantive due process claim because he alleged, and had advanced evidence to support the allegation, that the Board had acted in an arbitrary and irrational manner in finding that he was in violation of the zoning because of illegal expansion of the use. *Id.*, at 601. Thus, *DeBlasio* held that material issues of fact remained to bar summary judgment. *Id.*, at 601. In this case, there has been a trial and the court below expressly found that the City's conduct was *not* arbitrary and irrational.

There is no split of authority among the circuits concerning the issues in this case. The petition does not cite a single case finding a federal procedural due process violation based on the denial of discretionary land use permits.

E. THIS CASE DOES NOT RAISE ANY ISSUE CONCERNING THE RIGHT TO REASONABLE USE OF LAND OR ANY ISSUE WHICH REQUIRES THIS COURT TO CLARIFY THE RIGHTS OF LANDOWNERS IN THEIR PROPERTY

The petition claims that guidance is needed from this Court concerning whether landowners seeking permits have a protected property interest in their land. However, the law is already clear that landowners have protected interests in the ownership of land. They have the right to reasonable use of land, to economically viable use of land, to exclude others from their land, to sell their land, to freedom from restrictions on the use of land which are arbitrary and irrational or deny them equal protection of

the law and the right to compensation if their land is taken for a public purpose. However, none of those rights are at issue in this case.

The Clarks have reasonable and economically viable use of their land as a duplex. That is the use which existed on their property when they purchased it. They may also change that use to other multiple residential uses which comply with the City's Municipal Code. It is undisputed that they may build condominiums on their property, albeit smaller and less tall than they would prefer.

There has been no interference with the Clarks' right to exclude others from their property or to sell their property. They are in possession of their property and there has been no attempt to take their property. There is no contention in this case that the provisions of the Municipal Code impose unconstitutional restrictions on their right to use their property. Further, the Municipal Code required the same conditional use permit and precise plan permit when they purchased the property as it does now. Thus, there is no credible basis for claiming that this case involves a threat to the rights inherent in owning land.

In an attempt to conjure up an issue which is related to this case and justifies review by this Court, the petition cites cases concerning property rights which arise in a variety of disparate contexts without ever identifying the context for the Court. Thus, they cite cases involving substantive and procedural due process, and facial and as applied, attacks on land use decisions without acknowledging the differing legal analyses required for each of

those claims and without explaining how those cases apply to the facts of this case. For example, petitioners cite *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 71 L.Ed. 303, 474 S.Ct. 114 (1926), to claim that the interest the courts should look to in determining whether there is a protected property interest is ownership of land rather than the permit sought. However, *Village of Euclid* involved a facial attack on a zoning ordinance and applied a *substantive* due process analysis in determining its constitutionality. It has no application to the Clarks' claim that they were denied *procedural* due process because they did not receive the fair hearing required by California law on their permit applications.

There is no ambiguity in the legal principles applicable to this case. It is a run of the mill zoning dispute and the court below correctly determined that the Clarks have no federal procedural due process claim because they have no protected property interest in the permits they seek and no substantive due process claim because the City did not act arbitrarily or irrationally in denying the permits.

F. THE OPINION BELOW IS CLEARLY CORRECT

1. There Is No Basis For Finding A Violation Of Federal Procedural Due Process In This Case Because No Federally Protected Property Interest Is Involved

This Court explained in *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed.2d 548, 92 S.Ct. 2701 (1972) that:

> "The requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." *Id.*, 408 U.S. at 569-570, 33 L.Ed.2d at 556.

No liberty interest is involved in this case and the question presented is whether the Clarks have a protected property interest in the discretionary permits they seek. As *Roth* explains, to have a protected property interest:

> "[A] person clearly must have more than abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead have a legitimate claim of entitlement to it." *Id.*, 408 U.S. at 577, 33 L.Ed.2d at 561.

As *Roth* further explains:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . " *Id.*

It is undisputed that under California law there is no entitlement to the discretionary permits sought by the Clarks in this case. Thus, under *Roth*, and the legion of state and federal circuit court opinions following it, there is no basis for finding a violation of federal due process in this case because it does not involve a protected property interest.

While the petition argues that *Roth* should not apply when ownership of land is involved, there is no reason

why the Clarks' desire to replace their duplex with condominiums is any more important, or should be treated any differently, than the desire for continued employment at issue in *Roth*. As discussed in Part D above, not even the cases cited in the petition to claim that *Roth* should not apply in the land use cases have held that a plaintiff can state a federal procedural due process claim when discretionary land use permits have been denied.

If the Court were to accept petitioners' argument that the mere fact of land ownership automatically creates a federally protected interest whenever a land use permit is sought, there is hardly a land use decision made by local jurisdictions that would not be subject to challenge in the federal courts. Anyone who wished to construct a building taller than permitted or closer to his neighbor than permitted by a local zoning body could challenge the decision in federal court under 42 U.S.C. § 1983 on the ground that the decision was arbitrary or that a fair hearing was not provided. The federal courts would be inundated with cases in which they must act as zoning appeal boards and local control of planning and zoning would be eviscerated.

2. There Is No Basis For A Federal Procedural Due Process Claim In This Case Because State Law Provides An Adequate Remedy

Even when a federally protected interest is established, the remedy for procedural errors in making local land use decisions, such as denial of a fair hearing, generally lies in state court. Thus, in *DeBlasio, supra*, 53 F.3d 592, which is relied on in the petition, the plaintiff had a

protected property interest in continuing his existing non-conforming use and he alleged that the zoning board had acted in an arbitrary and irrational manner in finding him in violation of the zoning ordinance. Nonetheless, the opinion in *DeBlasio* explains that:

> "In order to establish a violation of his right to procedural due process, DeBlasio in addition to proving a person acting under color of state law deprived him of a protected property interest, must establish that the state procedure for challenging the deprivation does not satisfy the requirements of procedural due process. (citation) . . . a state provides constitutionally adequate procedural due process when it provides reasonable remedies to rectify a legal error by a local administrative body." *Id.*, 53 F.3d at 592.

In *River Park, supra,* also relied on in the petition, the court assumed that River Park had an entitlement to the permits it sought and found that the city had improperly employed a series of procedural maneuvers to prevent a decision on River Park's proposal. It nonetheless held that River Park had no federal claim even though River Park got less due process than required by Illinois law:

> "the Constitution does not require state and local governments to adhere to their procedural promises. (citations) Failure to implement state law violates that state law, not the Constitution; the remedy lies in state court." *Id.*, 23 F.3d at 166-167.

In this case, California law and the Municipal Code require notice and a meaningful opportunity to be heard. The City held a noticed, public hearing on the Clarks' application and denied the permits on the grounds that

the height of their proposed condominiums were incompatible with the neighborhood and exceeded the lot coverage permitted by the Municipal Code. California law provides an adequate remedy for challenging such decisions. Thus, California Code of Civil Procedure § 1094.5 provides that a peremptory writ of mandate setting aside the decision and, when appropriate, remanding it to the local agency for further proceedings in light of the court's opinion,[5] shall issue if: (1) the decision is not supported by substantial evidence; (2) a fair hearing was not provided; or (3) the local agency failed to proceed in the manner required by law. (R.App. 6)

This is clearly an adequate remedy and the Clarks did in fact obtain relief under Code of Civil Procedure § 1094.5. The court below held that they did not receive a fair hearing and ordered the City to provide a new hearing without the participation of the councilmember it found to be biased. Under *DeBlasio* and *River Park*, the existence of that remedy precludes a federal procedural due process claim.

Further, a federal procedural due process claim does not lie when an adequate post deprivation remedy, such as that provided by California Code of Civil Procedure § 1094.5, is available and the State cannot provide a predeprivation process that could have prevented the

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[5] In some cases setting aside a decision or regulation is a sufficient remedy and there is no need for a remand. In some cases, the respondent agency may choose to adopt a revised regulation or take no action. However, when an erroneous decision has been made on a discretionary application, a new hearing is required to protect the petitioner/applicant.

deprivation. *Parratt v. Taylor*, 451 U.S. 527, 68 L.Ed.2d 420, 101 S.Ct. 1908 (1981) and *Zinermon v. Burch*, 494 U.S. 113, 108 L.Ed.2d 100, 110 S.Ct. 975 (1990). *Zinermon* explains that this rule is limited to situations involving "random and unauthorized conduct" because it is not possible to provide a predeprivation process that would prevent a random or unauthorized deprivation.

Thus, in *Parratt* a post deprivation remedy was adequate and barred a federal procedural due process claim because:

> "It would do no good for the State to have a rule telling its employees not to lose mail by mistake, and it 'borders on the absurd to suggest that a State must provide a hearing to determine whether or not a corrections officer should engage in negligent conduct.' " *Zinermon*, 494 U.S. at 136-137, 108 L.Ed.2d at 121.

Similarly, the existence of a post deprivation remedy barred a federal procedural due process claim in *Hudson v. Palmer*, 468 U.S. 517, 82 L.Ed.2d 393, 104 S.Ct. 3194 (1984), because there was no way the State could provide a predeprivation process that could have prevented the intentional destruction of a prisoner's property which resulted from the personal animosity of a prison guard toward that particular prisoner:

> "The errant employee himself could anticipate the deprivations since he intended to effect it, but the State still was not in a position to provide predeprivation process, since it could not anticipate or control such random and unauthorized intention conduct. (cites) Again, a rule forbidding a provision guard to maliciously destroy a prisoner's property would not have

> done any good; it would be absurd to suggest that the State hold a hearing to determine whether a guard should engage in such conduct." *Zinermon*, 494 U.S. at 137, 108 L.Ed.2d at 121.

In this case, the crux of the Clarks' claim is that they did not get a fair hearing before their applications were denied because a biased councilmember participated in the hearing and an issue concerning the interpretation of the lot coverage provision of the Municipal Code was first raised after the close of the hearing. Although California requires a fair hearing before acting on applications for permits like those at issue in this case, there is no way that California could anticipate or control such mistaken and unauthorized conduct. In this regard, neither the City Council nor the city attorney were even aware of most of the facts on which the court below based its ruling that the Clarks were denied a fair hearing. (App.A 43, fn.33)

Under these circumstances, a federal procedural due process claim does not lie because California provides an adequate remedy. *Zinermon; Parratt, supra.* The Clarks have already obtained relief under that remedy.

3. There Was No Arbitrary Or Irrational Conduct In This Case Which Could Provide The Basis For A Substantive Due Process Claim

As the petition acknowledges, arbitrary and irrational conduct is required to establish a violation of substantive due process. (Pet. at 22 and the cases cited there)

However, the opinion below expressly held that the conduct of the City in denying their permit applications was *not* arbitrary and irrational. (App.A 41, 43-44, see quotations from the opinion in Part C above) The petition does not dispute that ruling. Thus, there is no basis on which to find a substantive due process violation.

Further, no important issue justifying review by this Court would arise even if petitioners disputed that ruling. Such a claim would, in essence, require this Court to review the decision of the court below for factual error. That is not an appropriate basis for review by this Court and would not present an issue of concern to anyone but the parties to this case.

CONCLUSION

The City respectfully requests that this Court deny the Clarks' petition for writ of certiorari because there is no final judgment in this case, it raises an issue not raised below, it presents no issue appropriate for this Court's review and the holdings of the court below were not in error.

DATED: March 11, 1997

Respectfully submitted,

*ROCHELLE BROWNE
ROXANNE DIAZ MONTGOMERY
*Counsel of Record
and
MICHAEL JENKINS
City Attorney
City of Hermosa Beach

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NO LEGAL FILE DEPT.SW B

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES

Date: December 10, 1996

Honorable JEAN E. MATUSINKA, Judge	)	DEBORAH LUNA, Deputy Clerk
KEN DOOL, Deputy Sheriff, Court Attendant	)	NONE, Reporter, E/R Monitor

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YS002665 (Parties and Counsel checked if present)

CLARK, DOUGLAS A	Counsel For N/P Plaintiff
CITY OF HERMOSA BEACH	Counsel For N/P Defendant

NATURE OF PROCEEDINGS: RETURN ON REMITTITUR

Pursuant to the Appellate Court's decision, the court issues a Writ of Administrative Mandate commanding the Hermosa Beach City Council to set aside its decision overturning the planning commission's approval of the Clark's project; to rehear the appeal from the planning commission's decision and to provide the Clarks' with a fair hearing on the matter.

The court orders Plaintiffs' to resubmit their cost bill in compliance with the Appellate Court's decision, and CCP Section 1033.5.

A copy of this minute order is sent via U.S. mail this date to the parties below:

Rutan & Tucker
Ms. Katherine Jenson
611 Anton Blvd.
#1400
P.O. Box 1950
Costa Mesa, Ca 92626-1950

Oliver, Barr & Vose
Mr. Roger Springer
281 S. Figueroa St.
Second Floor
Los Angeles, Ca 90012-2501

Minutes Entered: December 10, 1996

RUTAN & TUCKER
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Attorneys for Plaintiffs/Petitioners
Douglas A. Clark and Cheryl Clark

ORIGINAL FILED
DECEMBER 27, 1996
LOS ANGELES
SUPERIOR COURT

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DOUGLAS A. CLARK and CHERYL CLARK, Plaintiffs/Petitioners, vs. CITY OF HERMOSA BEACH, THE CITY COUNCIL OF THE CITY OF HERMOSA BEACH, and DOES 1 through 25, inclusive, Defendants/Respondents.	Case No. YS002665 ASSIGNED FOR ALL PURPOSES TO: JUDGE JEAN E. MATUSINKA DEPARTMENT B STIPULATION TO STAY PROCEEDINGS PENDING UNITED STATES SUPREME COURT ACTION ON PETITION FOR CERTIORARI; [PROPOSED] ORDER Complaint Filed: 07/17/92

THIS STIPULATION IS ENTERED INTO between Plaintiffs/Petitioners DOUGLAS A. CLARK and

CHERYL CLARK (collectively "the Clarks") on the one hand and Defendants/Respondents THE CITY OF HERMOSA BEACH and THE CITY COUNCIL OF THE CITY OF HERMOSA BEACH (collectively "Defendants") on the other hand, through their respective counsel.

WHEREAS the Court of Appeal's decision in this matter was issued and the matter has been remanded with direction;

AND WHEREAS the Clarks intend to file a Petition for Certiorari to the United States Supreme Court and anticipate doing so in early February of 1997;

AND WHEREAS the parties wish to stay any proceedings at the trial court and any administrative actions by the City pending determination by the United States Supreme Court of the Clarks' Petition for Certiorari;

NOW THEREFORE it is stipulated by and between the parties that all proceedings before the trial court and all administrative proceedings before the City or City Council should be stayed pending determination by the United States Supreme Court of the Clarks' Petition for Certiorari.

DATED: December 20, 1996

RUTAN & TUCKER
JEFFREY M. ODERMAN
M. KATHERINE JENSON

By s/Katherine Jenson
M. Katherine Jenson
Attorneys for Plaintiffs/
Petitioners
DOUGLAS A. CLARK
and CHERYL CLARK

DATED: December 26, 1996

RICHARDS, WATSON &
GERSHON ROCHELLE BROWNE

By s/Rochelle Browne
Rochelle Browne
Attorneys for Defendants/
Respondents THE CITY
OF HERMOSA BEACH

ORDER

All proceedings in the within action, including any administrative proceedings, are stayed pending determination by the United States Supreme Court of the Petition for Certiorari to be filed by the Clarks.

DATE: December 27, 1996

s/Jean E. Matusinka
Jean E. Matusinka, Judge of the
Superior Court

EXCERPTS FROM THE CALIFORNIA CODE OF CIVIL PROCEDURE

CHAPTER 2

Writ of Mandate

Sec. 1094.5. Inquiry into validity of administrative order or decision.

(a) Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as the result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the inferior tribunal, corporation, board, or officer, the case shall be heard by the court sitting without a jury. . . .

(b) The inquiry in such a case shall extend to the questions whether the respondent has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

Sec. 1097. Penalty for disobedience to writ. When a peremptory mandate has been issued and directed to any inferior tribunal, corporation, board, or person, if it appear to the court that any member of such tribunal, corporation, or board, or such person upon whom the writ has been personally served, has, without just excuse, refused or neglected to obey the same, the court may, upon motion, impose a fine not exceeding one thousand dollars. In case of persistence in a refusal of obedience, the court may order the party to be imprisoned until the writ is obeyed, and may make any orders necessary and proper for the complete enforcement of the writ.

EXCERPTS FROM THE HERMOSA BEACH MUNICIPAL CODE

R-3 ZONE MINIMUM STANDARDS

Sec. 7.2-4. Conditional use permit required.

All condominiums, community apartments and stock cooperatives shall be subject to approval of a conditional use permit by the planning commission.

Sec. 7.2-6. Minimum design standards.

(c) *Height:* In addition to height restrictions found within the various zones, along walk streets the maximum height in the front half of the lot shall be twenty-five (25) feet. The walk street shall be considered the front of the lot, except on reversed corner lots, where the side yard adjacent to the walk street shall be considered the front.

Sec. 229.1. Lot coverage.

"Lot coverage" shall include the footprint of the building plus cantilevers and decks higher than thirty (30) inches above grade.. Exceptions, not to be included when calculating lot coverage are: architectural projections, eaves, and open and unenclosed balconies that project from the face of the building, not exceeding a five-foot projection.

Sec. 601. Height.

No building shall exceed thirty-five (35) feet in height. Refer to Article 7.2 for additional height requirements for condominiums.

Sec. 606. Permissible lot coverage.

All buildings, including accessory buildings and structures, shall not cover more than sixty-five (65) percent of the area of the lot.

Sec. 607. Usable open space.

There shall be a minimum of two hundred (200) square feet of usable open space per dwelling unit.

(1) Fifty (50) percent of the required open space shall be directly accessible to each unit and solely for private enjoyment and use by a specified unit.

(2) Private and common open space may be covered up to fifty (50) percent, but shall not be enclosed on more than two (2) sides.

(3) The minimum dimension of open space areas shall be seven (7) feet.

(4) Common open space areas may include pools, spas, gardens, play equipment, courtyards (a minimum of twenty (20) feet wide), decks over non-living areas, and/or similar area, but shall not include driveways, turning areas; parking areas, and required front, rear, and side yard areas.

(5) Private open space areas may include patios, pools, spas, and garden areas; also balconies and decks over non-living areas or over living areas of the same dwelling unit when accessible through the interior of the dwelling unit and over only the dwelling unit for which there is interior access.

(6) Refer to Article 7.2 for additional requirements for condominiums.

(7) When computing open space in conjunction with yard areas, only an area which exceeds the minimum required yard area may be counted toward open space and only if the overall dimension of the required setback and the exceeding area together has a dimension of at least seven (7) feet in width and length.

(8) Circular, triangular, odd, and/or unusual shaped open space areas shall have a minimum of forty-nine (49) square feet in area as well as minimum seven-foot dimensions.

(9) Decks, balconies or similar areas which extend over more than one (1) dwelling unit shall have a minimum S.T.C. rating of 58.

CONDITIONAL USE PERMITS

Sec. 1404. Purpose.

The purpose of a conditional use permit shall be:

(1) To assure that the degree of compatibility shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses within the general area in which such use is proposed to be located; and

(2) To recognize and compensate for variations and degree of technological processes and equipment as related to the factors of noise, smoke, dust, fumes, vibration, odors and hazards.

PRECISE DEVELOPMENT PLANS

Sec. 1430. Purpose and intent.

The purpose and intent of requiring precise development plan review for development projects is to achieve a reasonable level of quality, compatibility, in harmony with the community's social, economic and environmental objectives, and to protect existing and potential developments, and uses on adjacent and surrounding property.

Sec. 1431. Projects requiring review.

In order to achieve the purpose of this section, it is considered necessary to require that the use of land, erection, construction or location of buildings or structures in any zone shall require submittal of plans for planning commission review, with the exception of the following:

(1) Single-family residences, including new construction, remodels, or additions thereto.

(2) Remodels or additions of less than one thousand five hundred (1,500) square feet in any zone.

Sec. 1432. Standards and review criteria.

(A) *Standards.* All development shall be in compliance with minimum standards of the zoning ordinance. On a case basis, the planning commission may impose standards above the minimums designated by the zoning ordinance to improve the quality of development and to mitigate any environmental impacts.

(B) *General criteria.* In considering the precise development plan for any development, the following

criteria for granting or conditionally granting said permit shall be considered:

(1) Distance from existing residential uses in relation to negative effects.

(2) The amount of existing or proposed off-street parking in relation to actual need.

(3) The combination of uses proposed, as they relate to compatibility.

(4) The relationship of the estimated generated traffic volume and the capacity and safety of streets serving the area.

(5) The proposed exterior signs and decor, and the compatibility thereof with existing establishments in the area.

(6) Building and driveway orientation in relation to sensitive uses, e.g., residences and schools.

(7) Noise, odor, dust and/or vibration that may be generated by the proposed use.

(8) Impact of the proposed use to the city's infrastructure, and/or services.

(9) Adequacy of mitigation measures to minimize environmental impacts in quantitative terms.

(10) Other considerations that, in the judgment of the planning commission, are necessary to assure compatibility with the surrounding uses, and the city as a whole.

(C) *Criteria for denial.*

(1) The proposed development would substantially depreciate property values in the vicinity or interfere with the use or enjoyment of property in such area, because of excessive dissimilarity or inappropriateness of design in relation to the surrounding vicinity, and there are no known conditions of approval which can be imposed that could resolve such problems.

(2) The proposed development would have significant environmental adverse impacts which are not mitigable, and where the finding of overriding considerations cannot be made.